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## Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies\*

MYRES S. McDOUGAL\*\*

### I. DELIMITATION OF THE PROBLEM: THE APPLICATION OF HUMAN RIGHTS PRESCRIPTIONS

It is particularly opportune that this centenary meeting of the International Law Association should focus attention upon the protection of human rights at a time when it is increasingly recognized that there is a human rights dimension to every human interaction and every authoritative decision. The task that I propose for myself in our program, in supplement to the many important statements about particular authoritative prescriptions and about "structures or institutional arrangements" designed better to promote and protect human rights, is that of inquiring into the possibilities of improving our intellectual procedures for the detailed clarification and specification of the substantive content of human rights in specific instances of application.<sup>1</sup> The best formulated prescriptions may be but illusion, and the best designed structures or institutional arrangements may be but castles upon the sands, if the persons making important community decisions do not understand the basic purposes of

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\* Copyright retained by Myres S. McDougal. This paper was presented at the centenary celebration of the International Law Association in Brussels on August 30, 1973. It will eventually appear also in a centenary volume of the Association. The paper draws upon collaborative studies in association with Lung-chu Chen, Harold D. Lasswell, and W. Michael Reisman. The writer is especially indebted to Dr. Chen for assistance in the preparation of this paper and its appendices.

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\*\* Sterling Professor of Law, Yale Law School. B.A., 1925, M.A., 1926, LL.B., 1935, Univ. of Mississippi; B.A. (Juris.), 1929, B.C.L., 1930, Oxford; J.S.D., 1931, Yale Law School; L.H.D., 1954, Columbia; LL.D., 1966, Northwestern.

1. This allocation of effort is inspired by Professor John P. Humphrey's insightful study, *The International Law of Human Rights in the Middle Twentieth Century*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* (M. Bos ed. 1973), from which the quoted words are taken.

the prescriptions and structures and how to relate such purposes to specific instances of choice.

It has been many times observed how the early, rudimentary demands for physical security and inviolability of the person, with freedom from arbitrary restraint and cruel and inhumane punishments—for liberty in its most primitive sense—have burgeoned, through related demands for freedoms of opinion and expression, of conscience and worship, and of meeting and association, into a comprehensive insistence today by most of the peoples of the world upon a full and rich participation in all the basic community value processes upon which more rudimentary rights depend.<sup>2</sup> Different peoples located in different parts of the world, and conditioned by varying cultural traditions, do of course assert these more fundamental demands in many different nuances of institutional practice and modality; but there is an overriding insistence, transcending all cultures and climes, upon the greater production and wider distribution of all basic values, with increasing recognition that a world public order of human dignity can tolerate wide differences in the specific practices by which values are shaped and shared, so long as all demands and practices are effectively appraised and accommodated in terms of common interest.<sup>3</sup> Similarly, different peoples, conditioned by different philosophical and ideological traditions, do offer different justifications or logical derivations in support of their demands. The contemporary movement for human rights upon the world scene would appear to be heir to all the earlier great, though more partial, historic movements for man's freedom (in Europe, the Americas, and elsewhere) and to the enduring elements in most of the world's great religions and secular philosophies, most especially those of natural law and natural rights and of contemporary science with its findings about the deep interrelations of simple respect for the dignity of the person and all other values. Yet, again, there is growing awareness that, when different syntactic justifications converge upon the same empirical reference to all the basic rights of men, an intellectual tolerance for differences in styles of justification and derivation can only increase the likelihood of a wider

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2. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950); C.W. JENKS, *LAW, FREEDOM AND WELFARE* (1963); Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in *BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1* (Int'l L. Series No. 5, 1965); Castberg, *Natural Law and Human Rights: An Idea-Historical Survey*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS 13* (A. Eide & A. Schou eds. 1968); McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 *YALE L.J.* 60 (1949), reprinted in M. McDougal & ASSOC., *STUDIES IN WORLD PUBLIC ORDER* 335 (1960).

3. McDougal & Bebr, *Human Rights in the United Nations*, 58 *AM. J. INT'L L.* 603 (1964); C.W. JENKS, *HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS* (1960); *THE RIGHT TO BE A MAN* (UNESCO, J. Hersch ed. 1968).

realization of basic values, where people are able and willing to cooperate toward the common goal of the enhanced protection of inescapably shared rights.<sup>4</sup> The important fact is that the peoples of the world are today increasingly demanding—whatever their differences in cultural traditions, ideologies, and styles of justification—that all those basic rights, commonly characterized in empirical references as those of human dignity, be secured by the processes of law in all the different communities of which they are members, including especially the transnational or world community.<sup>5</sup>

It is equally common knowledge how a global prescribing or legislative process, characteristically operating at many different levels of deliberateness and explicitness, has in recent decades transformed all these cumulating demands of the peoples of the world for human rights into authoritative general community prescription.<sup>6</sup> There has been a vast proliferation of the most deliberate and explicit prescriptions, designed both to specify the content of human rights in various categories and to add general community expectations about authority and control to popular demand. These include such items as the United Nations Charter itself, the Universal Declaration of Human Rights, the Genocide Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Reduction of Statelessness, and a whole host of other specialized communications of varying purpose and geographic reach.<sup>7</sup> On a more fundamental level, simultaneously with all this deliberate and relatively explicit communication, the more ineluctable processes of “customary prescription,” with their less deliberate and less explicit formulations, have been operating through the communications from uniformities in private behavior and official decision and through the count-

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4. McDougal & Bebr, *supra* note 3. Contemporary attitudes are well-illustrated in the essays collected in the four volumes of *INTERNATIONAL INSTITUTE OF HUMAN RIGHTS, RENÉ CASSIN AMICORUM DISCIPULORUMQUE LIBER* (1969-72) [hereinafter cited as *RENÉ CASSIN*] and in *Essays in Honor of Egon Schwelb*, 4 *HUMAN RIGHTS J.* 194 (1971).

5. Humphrey, *The World Revolution in Human Rights*, in *HUMAN RIGHTS, FEDERALISM AND MINORITIES* 147 (A. Gotlieb ed. 1970); Toth, *Human Rights and World Peace*, in 1 *RENÉ CASSIN, supra* note 4, at 362; Lasswell, *The Interrelations of World Organization and Society*, 55 *YALE L.J.* 889 (1946), reprinted in *THE POLICY SCIENCES* 102 (D. Lerner & H. Lasswell eds. 1951).

6. A.H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* (1972); Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 *AM. J. INT'L L.* 337 (1972); A.H. ROBERTSON, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* (1964); Sohn, *Protection of Human Rights Through International Legislation*, in 1 *RENÉ CASSIN, supra* note 4, at 325.

7. A rich collection of the more important prescriptions is offered in I. BROWNIE, *BASIC DOCUMENTS ON HUMAN RIGHTS* (1971).

less declarations, resolutions, and recommendations of many different bodies, governmental and non-governmental, which have become a part of the working expectations of the peoples of the world. It does not seem unwarranted to observe, as a part of an ongoing global prescribing process, the emergence and gradual crystallization of a comprehensive "bill of rights," comparable to that exemplified in the constitutions of our more mature national communities, as an integral part of global constitutive process, however imperfect the other features of that process may be.

It should further be no cause for surprise that the prescriptions about human rights emerging from global constitutive process, whether or not regarded as establishing a comprehensive bill of rights, or *ius cogens*, are both complementary in form (in terms of rights protected) and highly abstract in their particular formulations. Even in mature national communities, constitutive prescriptions project a wide sharing of values among many participants, through many varied institutional practices, and under conditions which cannot be anticipated in detail. Complementary formulations, framed at many different levels of abstraction, are indispensable both to express the whole range of fundamental demands and expectations and to make tentative identifications of the different factual contexts in which different distributions of values are demanded and expected.<sup>8</sup> The immense flow of prescriptions alluded to above does in fact cover every phase of human interaction and all demanded values—civil, political, social, economic, cultural, and other—and in many particular instances of interaction such values must be in fact competitive, requiring choices among alternative prescriptions—or alternative interpretations of particular prescriptions—and protected values.<sup>9</sup> The necessities and potentialities of this complementarity are explicitly recognized in many of the human rights prescriptions in the form of requirements, first, for the accommodation of particular human rights with other human rights and the aggregate common interest, and second, of permissible derogations from some human rights in times of high crisis and intense threat to aggregate community interest. The same necessities and potentialities are less explicit, but no less inherent, in the high level of abstraction or ambiguity with which all the human rights prescriptions, like most other prescriptions, are perforce formulated.<sup>10</sup>

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8. That the complementarity in legal principle is a necessary correspondence to complementarity in social process is documented in McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System*, in *THE ETHIC OF POWER: THE INTERPLAY OF RELIGION, PHILOSOPHY, AND POLITICS* 221 (H. Lasswell & H. Cleveland eds. 1962).

9. The range of values covered in some of the more important prescriptions is indicated in terms of a convenient categorization (designed to be comprehensive) in APPENDIX III.

10. See Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 179; E-I DAES, *Restrictions and Limitations on Human Rights*, in 3 RENÉ CASSIN, *supra* note 4, at 79; M. CRANSTON, *WHAT ARE HUMAN RIGHTS?* at 51 *et seq.* (1962). It

The explicit recognition within the human rights prescriptions of the necessity for accommodating any particular human right with all other human rights and the aggregate common interest is beautifully illustrated in two Articles of the Universal Declaration of Human Rights." Article 29 reads:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30 reads:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Comparable illustration, in the specification of particular rights, is afforded by two articles of the International Covenant on Political and Civil Rights. Article 21 reads:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22 reads:

1. Everyone shall have the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other

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may be observed that what are commonly described as "limitations" on human rights are in fact but accommodations to other human rights.

11. The full texts of the various selections here quoted are readily accessible in BROWNLEE, *supra* note 7.

than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Further illustration could be multiplied from many particular prescriptions in relation to many particular rights.<sup>12</sup>

The explicit recognition of the necessity for authorizing derogation from particular rights in times of high crisis is excellently illustrated in the International Covenant on Civil and Political Rights. Article 4(1) reads:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The wording of the European Convention on Human Rights differs slightly. Article 15(1) reads:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

It will be noted that both prescriptions impose requirements of necessity and proportionality, the ascertainment of which must entail examination of very large factual contexts.<sup>13</sup>

The high level of abstraction, or ambiguity, in which the human rights prescriptions are formulated, if not already sufficiently evident in the selections quoted above, may be observed as broadcast in all the prescrip-

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12. In APPENDIX IV we offer comprehensive indication of explicit provisions for accommodations and derogations in a number of important prescriptions.

13. For general discussion of the complexities of the problems of derogation and accommodation, see A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE 58, 62, 69 (1963); J.B.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 222, 245 (1969); Morrisson, *Margin of Appreciation in Human Rights Law*, 6 HUMAN RIGHTS J. 263 (1973). It will be noted that the intellectual difficulties in problems of accommodation and derogation are much the same, with the latter distinguishable only by the additional fact of alleged community crisis.

tions. The mere leafing through any collection of these prescriptions must disclose such terms as "arbitrary," "fair hearing," "inhuman treatment or punishment," "degrading treatment," "forced or compulsory labour," "slavery or servitude," "privacy," "any obligation required by law," "compelling reasons of national security," "prejudice and interests of justice," "any propaganda for a war," "the equal protection of the law," "the protection of morals," "necessary in a democratic society," "public emergency," "threatens the life of the nation," and so on. A distinguished young Asian scholar has written an entire doctoral thesis for a great law school on the meaning in the Universal Declaration of Human Rights of the one word, "arbitrary," seeking to establish that the word means "unjust" rather than "illegal"; unhappily, he does not fully recognize that the word arbitrary is commonly employed to summon up all the complementary interests to a particular right and, hence, he does not offer us much succor in attaching a reference to "unjust."<sup>14</sup> An older American scholar has made an exhaustive study of the meaning of "fair hearing" in the international covenants, attempting as vainly as incestuously to establish the meaning of one abstract text by reference to other equally abstract texts; it can scarcely be grounds for forgiveness that the method he follows is that prescribed by the Vienna Convention on the Law of Treaties.<sup>15</sup>

It should be obvious that the application in particular instances of all these complementary and highly abstract human rights prescriptions can be no automatic process in which the applier merely interprets the literal words of a single text and maintains a putative fidelity to that text.<sup>16</sup> In any particular instance an applier may be confronted with competing claims by different parties about highly complex or obscure facts and is commonly confronted not with a single prescription but with a vast body of allegedly relevant prescriptions. The responsible performance of the application function in such instances may require a whole sequence of activities or choices, including: the exploration of the potential facts and

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14. Hassan, *The Word "Arbitrary" as Used in the Universal Declaration of Human Rights: "Illegal" or "Unjust"*, 10 HARV. INT'L L.J. 225 (1969). Candor compels disclosure that this young scholar was also one of my favorite students. In an article on *The International Protection of Human Rights: An Approach to Interpretation*, 19 BUFF. L. REV. 35 (1969), Mr. Hassan does recommend a contextual approach to the problem of interpretation.

15. Newman, *Natural Justice, Due Process, and the New International Covenants on Human Rights: Prospectus*, 1967 J. PUBLIC L. 274. See also Newman, *Interpreting the Human Rights Clauses of the UN Charter*, 5 HUMAN RIGHTS J. 263 (1972). It is not our intention to suggest that texts are unimportant—only that they require supplementation by reference to many other features of the process of prescriptive communication. See McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 992 (1967).

16. The allusion is to Sir Gerald Fitzmaurice's eloquent, inspirational plea for fidelity to texts. Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or our "Interpretation" of it?*, 65 AM. J. INT'L L. 358 (1971).

their larger context; the exploration of the potential policies apparently relevant to the provisional focus upon the facts; the characterization of the facts and determination of their varying degrees of relevance; the selection from among the potential policies of those to be applied and the detailed relation of these policies to the facts regarded as relevant; and finally, the formulation and projection of the decision, with indication of measures appropriate to securing conformity.<sup>17</sup> For an applier genuinely dedicated to the clarification and implementation of the common interest, the necessities of an informed and rational, yet still personal, choice must stalk every act in this sequence.

The tasks of exploring and clarifying potentially relevant policies within the whole process of application are commonly regarded as especially complex and open-ended.<sup>18</sup> For the purpose of a more detailed examination of these tasks and of considering possible intellectual procedures for their improved performance, it is suggested that these tasks may be somewhat more discriminatingly and precisely categorized in threefold fashion.

*A. Ascertaining the Community Expectations Expressed in Particular Prescriptions*

This task requires a genuine effort to achieve the closest possible approximation of the aggregate of effective general community expectations about the content, authority, and control of alleged prescriptive communications. No other goal could be compatible with the conception that authority comes from the members of a community and with demands for the wide sharing of power. The adequate performance of this task requires a disciplined, systematic survey and assessment of all features of the process of communication and its context which may affect expectation. The significance for community expectation of any one feature of a prescriptive process of communication is dependent upon its interrelations with all the other features of the process.

*B. Supplementing Incomplete and Ambiguous Communications*

This task requires the remedying of the inevitable gaps and ambiguities in particular prescriptions by reference to more general, basic community policies about the shaping and sharing of values. In conventional presentations this task is sometimes described in terms of the exercise of "reason"

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17. The main features of this process are indicated in McDougal, Lasswell, and Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (C. Black & R. Falk eds. 1969).

18. This point is extensively documented in M. McDougal, H. Lasswell & J. Miller, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* (1967).



or the invocation of analogies. Its adequate performance demands, however, the disciplined employment of a comprehensive set of procedures, including at least: specification of each of the opposing claims about prescription in terms of the interests sought to be protected and the particular demands for authoritative decision; formulation of the different options open to the relevant decision-maker or other evaluator, which may be more extensive than the decisions demanded by the opposing parties; estimation of the consequences of alternative choices among possible options upon the aggregate inclusive interests of the general community and the exclusive interests of the particular parties; and choice of the option which promises to promote the largest aggregate long-term common interest, inclusive and exclusive.

### C. *Integrating Particular Expectations with Basic Community Policies*

This task requires a decision-maker or other evaluator who, recognizing that he is responsible for the total policy of the community which he represents or of which he is a member, will reject even the most explicit, precisely-formulated expectations when they are inimical to basic, more intensely-demanded community policies. The task is made authoritative with respect to international agreements by the newly formulated constitutive prescription about *ius cogens*.<sup>19</sup> The considerations which prompted the making of this prescription for international agreements apply, however, no less cogently to the less deliberately formulated prescriptions of customary law. The adequate performance of this task demands procedures comparable to those recommended for supplementing expectations, with explicit specification of the more intensely demanded general community policies and the deliberate rejection of any prescriptive intimations that contravene these policies. Since the emerging human rights prescriptions themselves largely embody our contemporary community's most intensely demanded policies, occasion for the supercession of a human rights prescription can be expected to be infrequent.

The important question now is whether it is possible to identify intellectual strategies or procedures which might be employed to minimize the arbitrariness and increase the rationality of all the various choices which an applier or other evaluator must necessarily make. Some observers find it impossible to specify goals for application, such as we have suggested above, and, hence, despair of introducing meaning and order into any imaginable principles of application. Other observers, underestimating the difficulties inherent in the problem, prefer to cherish the illusion that they

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19. Final Report of the Vienna Convention on the Law of Treaties, arts. 53, 64, *opened for signature*, May 23, 1969, U.N. Doc. A/Conf. 39/27, May 22, 1969, *reprinted in* 8 INT'L L. MATERIALS 679 (1969). This treaty is not yet in force.

can secure certainty by the undisciplined contemplation of the verbal texts, which, however important, are but one of the instruments of communication.<sup>20</sup> It is our brief that by the systematic and disciplined employment of a number of interrelated intellectual strategies it might be possible both to reduce the arbitrariness and to increase the rationality of application. The more important strategies we might recommend toward this end would include at least the following: (1) the clear establishment of an observational standpoint, in identification with the whole of mankind; (2) the explicit postulation of a comprehensive set of overriding goal values; (3) the specification of more detailed presumptive preferences with respect to all values in community process; (4) the specification of presumptive preferences about each major feature of constitutive process; and (5) the systematic employment of a comprehensive set of principles of content and procedure for the examination and appraisal of all relevant features of a problem in application in its context. A brief exposition may suggest what is entailed in each of these particular recommendations.

## II. THE RECOMMENDED METHOD OF CLARIFICATION

### A. *The Establishment of Observational Standpoint*

The applier or other evaluator should make himself as conscious as possible of all the different communities, from global to local, of which he is a member and upon which his choices must have unavoidable impacts. His most appropriate identifications are with all these communities, concentric in their geographic reach and interpenetrating in their value processes, and his primary concern should be that his choices take into account the aggregate consequences for all these communities and reflect their common interests. The aspiration of an applier who represents a community whose basic constitutive process projects a comprehensive public order of human dignity—as is increasingly sought in the contemporary human rights prescriptions—and who is himself genuinely committed to this goal, should be to make his every particular application of authoritative prescription contribute to progress toward this goal. Such an applier will recognize that, in a global interdetermination of all values, there is indeed a human rights dimension to all interaction and decision, and will make every effort to insure that such dimensions are effectively taken into account in decision. This recommendation, it may require emphasis, is not that a decision-maker assume the license to impose his own unique, idiosyncratic preferences upon the larger community. It is, rather, a demand that the decision-maker identify with the whole of the communities he

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20. The varying views are collected in McDUGAL, LASSWELL & MILLER, *supra* note 18, at 6 *et seq.*

represents and that he make a systematic, disciplined effort to relate the specific choices he must make to a clarified common interest, specified in terms of overriding community goals, for which he personally can take responsibility.<sup>21</sup>

The relevant perspective, that of identification with the whole of mankind engaged in a vast cooperative effort to enhance the protection of human rights, has been well-stated in one of the best books on human rights:

More and more, the world has come to recognize the validity of the claim of the human personality to be heard in every decision affecting the fate of man and to cast its decisive vote in the council of nations. Pope John XXIII spoke for all when he postulated a set of international rules of conduct and conscience, which rests on a conception of the universe in which the recognition of the moral personality of man and his dignity and rights stand in the center. In his celebrated encyclical *Pacem in Terris* of April 10, 1963, Pope John declared:

Like the common good of individual political communities, so too the universal common good cannot be determined except by having regard to the human person. Therefore the public authority of the world community, too, must have as its fundamental objective the recognition, respect, safeguarding and promotion of the rights of the human person. . . .

Above all the clamor of differences which divide people, men and women of all continents and of all latitudes and longitudes, regardless of the diversity in their background and outlook, are united in their quest for personal dignity and for the satisfaction of their human rights and fundamental freedoms.<sup>22</sup>

#### B. *The Explicit Postulation of Basic Public Order Goals*

The task of application might be made easier by the explicit postulation of a comprehensive set of goal values and their systematic employment through various interrelated skills in the detailed relation of community prescriptions to particular instances of interaction. The task of calculating the consequences of any particular application is, as a distinguished American legal philosopher has said, an "infinite" one if the calculator does not operate with "discriminating" criteria of what consequences are "impor-

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21. Elaboration is offered in McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

22. M. MOSKOWITZ, *THE POLITICS AND DYNAMICS OF HUMAN RIGHTS* 75, 76 (1968).

tant." The insistent question for every applier or other evaluator is for what basic policy goals he, as a representative of the larger community of mankind and of its various lesser component communities, is willing to commit himself as the primary postulates of public order for inspiring and shaping the particular choices he has to make.

The goal values we recommend for postulation are of course those which today are commonly described as those of human dignity, or of a free society, and which are incorporated with varying degrees of completeness and precision in reference in the many emerging human rights prescriptions to which allusion has been made above. These prescriptions, as we have seen, are formulated at many different levels of abstraction, and in terms of many differing complementarities, both explicit and implicit; but the basic thrust of the various prescriptions in sum is toward the greater production and wider sharing of all human dignity values. Thus, the opportunity open to the responsible applier today is not that of an idiosyncratic and private postulation, but rather that of an open and genuine commitment to the rising common demands of peoples everywhere.

It may be emphasized, as already suggested, that the recommended values of human dignity are not representative only of the exclusive, parochial perspectives of particular segments of the larger community of mankind. When properly understood and accepted, these values admit of a great diversity in the institutional practices by which they are sought and secured; in different cultures and communities, very different institutional practices may contribute to the shaping and sharing of the same values. When overriding goals are accepted, creativity and diversity may be encouraged by the protection of a wide range of functional equivalents in institutional practices.

It has been suggested by critics that the postulation of human dignity values is utopian because state officials do not in practice accept these values.<sup>23</sup> It may be agreed that many of the institutional features of the contemporary international arena do militate against effective human rights implementation. In addition to these features, however, one must consider the most deeply held and widely shared perspectives of the peoples who constitute the ultimate source of effective power in the different communities. We believe that value by value breakdown of the demands and expectations of peoples would, as suggested above, reveal strong trends toward an increasing consensus on the basic components of an international bill of rights. In the long run it is these demands and expectations

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23. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 848 (1935).

24. E.B. HAAS, *HUMAN RIGHTS AND INTERNATIONAL ACTION* 131 (1970). Professor Haas fails to distinguish the observational standpoint of the scholar from that of the state official and appears to assume that the perspectives ("consent") of state officials cannot be changed.

which will provide the effective conditions for the enhanced international protection of human rights.

It will be observed that we emphasize the postulation and clarification of public order goals in contradistinction to their derivation. It is not by faith and mere logical exercises that new knowledge can be acquired, but rather by the systematic and disciplined exercise of relevant intellectual skills.<sup>25</sup> Peoples subscribing to very different styles in derivation and justification have long demonstrated, as we have noted, that they can cooperate in the specification and promotion of the same human dignity values.

*C. The Specification of Presumptive Preferences with Respect to Value Processes*

Both deprivations and fulfillments of human rights occur as integral parts of the larger community processes in which all values are interdependent.<sup>26</sup> The task of application might be aided if appliers and other evaluators operated with comprehensive and detailed maps of their presumptive preferences about the different features of the value processes comprised within the larger community processes. The applier does an inadequate job if he does not appraise any specific choice in the light of all relevant community policies. "Unless," as Harold Lasswell has written, "tentative value judgments are reviewed in the context of a total conception of the preferred form of social order, unnecessary inconsistencies and omissions occur."<sup>27</sup>

The more comprehensive and detailed specification of presumptive preferences might extend beyond the general postulation of higher levels of production and wide sharing in all value processes to an itemization value by value and phase by phase within each value process. Such an itemization might include the development of detailed preferences about each phase of any particular value process which would put flesh and blood into such formulations as the following:<sup>28</sup>

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25. It is this which, contrary to Professor Haas' assertions (*id.*), distinguishes an approach by postulation from a "natural law" approach.

26. In this type of reference we build of course upon the value and institutional categorizations of the cultural anthropologists. See B. MALINOWSKI, *FREEDOM AND CIVILIZATION* (1944); B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926). The broad framework of inquiry we recommend is indicated in Lasswell, *Toward Continuing Appraisal of the Impact of Law on Society*, 21 *RUTGERS L. REV.* 616 (1967), reprinted in *THE LAW SCHOOL OF TOMORROW* 87 (T. Cowan ed. 1967). See also H. LASSWELL, *A PRE-VIEW OF POLICY SCIENCES* (1971); H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950).

27. Lasswell, *Clarifying Value Judgment: Principles of Content and Procedure*, 1 *INQUIRY* 87 (1958).

28. An earlier version of this outline appears in McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 *AM. J. INT'L L.* 237 (1969).

*Outcomes*

Achievement of an optimum aggregate in the shaping and sharing of the value;  
Access to a basic minimum of benefits;  
Enjoyment of further benefits on the basis of merit and contribution;

*Participation*

Widest possible access compatible with other overriding community values;  
Freedom from discrimination irrelevant to merit;  
Freedom to form and join groups;

*Perspectives*

Freedom to acquire demands for the value;  
Opportunity to discover latent capabilities for participation;  
Opportunity to acquire capabilities;  
Opportunity to exercise capabilities;  
Freedom to establish and change identifications;  
Opportunity to achieve realism in expectations;

*Situations*

Freedom from interference in initiating and constituting institutions;  
The establishment and maintenance of specialized and non-specialized institutions, adequate to maximize human potentials;  
Freedom of access to appropriate institutions;  
Compulsory access when necessary to responsibility;  
Freedom from deprivations disproportionate to crises;  
Optimum adjustment of institutions in space (territorially and pluralistically) and through time for the realization of purposes above;

*Base Values*

Access to authoritative decision to defend and fulfill all rights;  
Access to controlling value processes:  
    Basic minimum;  
    Equal access (protection against monopolization);  
Opportunity for continuing accumulation of the value;  
Special assistance to overcome handicaps in achieving access;

*Strategies*

Freedom to employ effective strategies in the shaping and sharing of the value;  
Preference for persuasive, rather than coercive, strategies;  
Freedom from discriminatory strategies.

If initial presumptive preferences of this order were applied to each value process, and to each claim for human rights within each value process—as itemized in Appendix I, “Claims Relating to the Process of Value Fulfillment and Deprivation”—it might be possible to create the comprehensive and detailed map that would assist in rational application. In particular applications the presumptive preferences with respect to each particular value process, or phase of such process, would, if basic goals in the protection of human rights are to be fulfilled, be given the utmost deference compatible with aggregate achievement. The precise delineation of the rights of any particular individual in any particular context would, however, always require—as the contemporary human rights prescriptions do require—an infinitely delicate accommodation with the comparable rights of other individuals and with the inclusive interests of all community members.<sup>29</sup>

*D. The Specification of Presumptive Preferences about Features of Constitutive Process*

The constitutive decisions of any community, global or lesser, are those which establish and maintain its most comprehensive process of authoritative decision: the decisions which identify the authoritative decision-makers, project the basic community policies which are to be sought, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for the making of decisions, and secure the performance of all the different types of decision functions (intelligence, promotion, prescription, innovation, application, termination, appraisal) necessary to the making and administering of general community policy. It is these decisions which determine the freedom, security, and abundance of a community's public order, including the degree to which human rights are promoted and protected or deprived, in all the community's different value processes.<sup>30</sup>

The principal concern of the contemporary human rights movement in relation to constitutive process has, unfortunately, been with either too generalized a concept of “implementation” or too narrow a focus upon isolated techniques designed to protect various particular rights. Any rational effort to improve implementation would, of course, extend to comprehensive inquiry about the whole global constitutive process of authoritative decision, considering in detail how participation, the specification

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29. The familiar contraposition of “human rights” and “collective rights” would appear to be a false one. When “collective rights” are given detailed semantic reference, they can refer only to the rights of individuals. The relevant question is as to the compatibility of the rights, “individual” or “collective,” with criteria of human dignity.

30. Amplification of these concepts is offered in Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971).

of goals, the establishment of structures, the allocation of bases of power, the performance of procedures, and the role of decision functions might be changed for the better promotion and securing of demanded rights. The point we would emphasize is, however, more fundamental: it is that a human rights dimension is present, not merely in the flow of decisions emerging from constitutive process for the protection of individual rights in all the various value processes, but also in decisions about every aspect of constitutive process. The most realistic effort to promote a better implementation of human rights must, accordingly, recommend policies appropriate to decisions about every phase of constitutive process for both the global community and its component lesser communities.

The literatures of political thought, jurisprudence, and international law offer a vast reservoir of policies relating to every phase of constitutive process potentially appropriate for the better reflection and securing of human rights.<sup>31</sup> Appendix II presents a highly impressionistic itemization, which we are in the process of developing in more detail elsewhere, of some of these inherited policies. The suggestion we make is that the quality of application, and hence of implementation, might be greatly improved if appliers made explicit their own more comprehensive conceptions of this order.

#### *E. Possible Principles of Content and Procedure in Guidance of Application*

The probability of maximizing the realization of the goals sought in application might be increased if the various established appliers would employ a comprehensive set of principles, both of content and procedure, designed to guide their attention in a systematic manner to all features of the context relevant to the rational performance of the different intellectual tasks of application. *Principles of content* guide the choice of subject matter relevant to evaluating the alternatives in policy open to a decision-maker; *principles of procedure* offer agendas and techniques for bringing pertinent content to the focus of a decision-maker's attention. The employment of these principles in application presupposes both the careful maintenance of the observational standpoint of the community representative and continuous reference to perspectives embodying a detailed specification of the goal values of human dignity. These more detailed specifications of human dignity perspectives will include, as sought to be illustrated above, both the more general value preferences for community process as a whole and the more specific features of the constitutive process for which

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31. For a brief survey of some of these policies, with references to an immense literature, see Lasswell & McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 GEO. WASH. L. REV. 1 (1972).



the applier takes responsibility.

The type of principle recommended may be illustrated briefly by reference both to principles of content and principles of procedure.<sup>32</sup>

### *Principles of Content*

The most general principle, that of contextuality, is that in performing the tasks of application, preference should be given to alternatives that have been considered and evaluated in the larger context of the processes of prescription, claim, and application and of the factors affecting such processes.

#### *1. Principles relating to the prescribing process.*

##### *a. Ascertaining the prescription*

(i) Give preference to the expectations shared by communicators and communicatees during the whole process of prescription.

(ii) Develop principles which refer to every feature of the process of prescription, indicating the presumptive relevance of such features for shared expectations about the content, authority, and control of alleged prescriptions.

##### *b. Supplementing expectations*

(i) Observe the expectations created by prescriptive communications for gaps, ambiguities, and contradictions.

(ii) Remedy any inadequacies in prescriptive communications by reference to the postulated basic goal values of human dignity (both public order and constitutive).

##### *c. Integrating expectations*

(i) Observe whether any alleged prescriptive communications contradict the postulated basic goal values of human dignity.

(ii) Remove any contradictions by reference to the postulated basic goal values of human dignity.

#### *2. Principles relating to the process of claim*

a. Since differences in types of controversies may affect choice of relevant prescriptions, the supplementing of incomplete prescriptions, and the integrating of prescriptions with basic community policies, employ principles which relate different types of controversies to the larger map of basic community policies.

b. Construct principles which categorize the different types of

32. These principles are being developed in more detail in a collaborative study with Professors Lasswell and Reisman.

controversies in terms of the values affected. (In Appendix I we offer an outline of claims about human rights which can be related to a comprehensive map of basic community policies.)

### 3. *Principles relating to the process of decision*

Employ principles which canvass every feature of the process of decision for its potential relevance to recommended outcomes and policy effects.<sup>33</sup>

#### *Principles of Procedure*

##### 1. *The contextual principle*

Employ procedures appropriately calculated to bring all relevant content to the focus of attention in the order best adapted to exhibiting relevance. In appraisal of claims and in performance of all intellectual tasks give priority to procedures which fully and systematically take the larger context into account. Avoid a fragmented approach which rigidly fixes upon a few features of the context. Although continuously engaging in evaluation, suspend final judgment until examination of the whole of the relevant context.

##### 2. *The principle of economy*

Adjust the time and facilities devoted to application to the importance of the values at stake in the controversy and to community policies.

##### 3. *The principle of manifest (provisional) focus*

For a provisional focus begin with the manifest, articulated demands of the parties themselves. For each party note the claims made about the facts (value processes affected and sought to be protected), about relevant prescriptions and other policies, and about appropriate decisions and measures in application.

On claims by states to derogate from human rights prescriptions because of public emergency, for example, contrapose the assertions of the state about necessity and proportionality with those of the individual (or his representative) about the absence of necessity and proportionality.

##### 4. *The principle of clarified focus*

Explore both precipitating events and context, independently of the perspectives of the parties, from the standpoint of the disinterested observer. Evaluate the different versions of potential facts and make an independent characterization. Note the whole of the potentially relevant prescriptions and the range of potential choices in decision.

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33. The principles recommended here would be comparable to those outlined in M. McDUGAL, H. LASSWELL & J. MILLER, *supra* note 18, at 61.

With respect to claims about derogation, for example, make a systematic, disciplined examination of all features of the context of alleged crisis and of proposed (or actual) measures in derogation to achieve an independent assessment of necessity and proportionality. It does not suffice, as sometimes suggested, to regard these questions as matters of "fact," about which nothing in general that is useful may be said.<sup>34</sup>

5. *The principle of observing trends in past experience*

Observe the successes and failures, in terms of approximations to general community policies, that have previously been achieved on comparable problems by invocation of the varying alternative prescriptions and by alternatives among the options in application.

6. *The principle of realistic orientation in factors affecting decision*

a. Observe the factors in predisposition and environment that appear to have affected past applications.

b. Appraise the probabilities of these and other factors affecting future decisions on comparable problems.

7. *The principle of observing the constraints of future probabilities*

a. Construct alternative future probabilities in decision and decision impact.

b. Estimate the relative costs and benefits, in terms of general community values, of the various alternatives in decision.

c. Calculate the probable net costs and net benefits of each option.

8. *The principle of evaluating and inventing options in decision.*

Relate all options to basic general community policies and choose the option that will promote the largest net aggregate of common interest.

### III. CONCLUSION

It is not my suggestion that any intellectual strategies, however systematically developed and carefully refined, can enable an applier to dispense with a final creative choice in the relation of human rights prescriptions, any more than of other prescriptions, to particular instances of human interaction. The necessities for such a choice are inherent in the materials with which he must work and the making of such a choice is his unique community responsibility. What I do suggest is that the employment of some such strategies as we have recommended, appropriately developed and elaborated, might enable an applier better to know what options are open to him and more rationally to relate his choice among such options to the fundamental general community perspectives which today infuse

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34. J.B.S. FAWCETT, *supra* note 13, at 249, commenting on the *Lawless* case.

the human rights prescriptions. Appropriate principles of content, making reference to all the various processes of interaction, could assist by insuring the systematic examination of all the relevant features of the context in performance of the necessary intellectual tasks of specifying policies, noting degrees of achievement in past decisions, determining conditioning factors, estimating probable future developments and impacts, and appraising the costs and benefits of different options in decision. Appropriate principles of procedure, designed to make an economic use of all resources at the applier's disposal, could assist by bringing this "content" information to a central focus of attention in which every significant detail of the context is appraisable in relation to all other such details, and whereby the applier is afforded maximum opportunity for making rational choices. For appliers genuinely dedicated to the common interest, the two kinds of principles, employed in appropriate combination, might serve to minimize the arbitrariness of choice and to establish a comprehensive and coherent frame of reference for the more effective relation of particular choices in application to the overriding goal values of an increasingly universal public order of human dignity.

## APPENDIX I

### CLAIMS RELATING TO THE PROCESS OF VALUE FULFILLMENT AND DEPRIVATION

#### I. CLAIMS RELATING TO RESPECT

##### A. *Claims relating to Outcomes*

1. Claims for a basic degree of respect as a human being
  - Freedom of choice
  - No slavery
  - No apartheid
  - No caste
2. Claims to a basic equality in the enjoyment of all values, i.e. freedom from discrimination for reasons irrelevant to merit.
  - Race (color)
  - National, ethnic or social origin
  - Birth, descent or other status
  - Sex
  - Religion (creed)
  - Property
  - Political or other opinion
  - Non-identification (disloyalty)
  - Moral character
  - Language
  - Literacy
  - Health (mental defect and illness)
  - Behavior (crime)
  - Alienage
  - Age

3. Claims for further rewards in respect for meritorious contribution (recognition, honor, reputation)
4. Claims for the protection of privacy
- B. *Claims relating to Participation*
  1. Claims for participation in the shaping of respect
    - Individuals
    - Groups
  2. Claims for participation in the sharing of respect
    - Individuals
    - Groups
- C. *Claims relating to Perspectives*
  1. Claims to be free to acquire a demand for respect
    - (a) Claims for opportunity to discover latent capabilities for participation
    - (b) Claims for opportunity to acquire capabilities
    - (c) Claims for opportunity to exercise capabilities
  2. Claims for freedom to establish and change identification
  3. Claims for opportunity to achieve realism in expectations
- D. *Claims relating to Situations*
  - (I) Institutions specialized to respect
    1. Claims for freedom to initiate and constitute institutions specialized to respect
    2. Claims for freedom of access to institutions specialized to respect
  - (II) Institutions not specialized to respect
    - Claims for freedom of access to institutions not specialized to respect
  - (III) Crisis
    - Claims that respect be proportionately accorded despite crises
- E. *Claims relating to Base Values*
  - (I) Authoritative
    - Claims that the process of authoritative decision is available to defend and fulfill respect
  - (II) Controlling
    1. Claims that participation in each of the other value processes is available to defend and fulfill respect
    2. Claims for special assistance to overcome handicaps not attributable to merit
- F. *Claims relating to Strategies*
  1. Claims to be free from the employment of the diplomatic instrument for deprivation of respect
  2. Claims to be free from the use of the ideological instrument for deprivation of respect
  3. Claims to be free from the management of goods and services as a denial of respect (e.g., forced labor, imprisonment for debt)
  4. Claims to be free from use of the military instrument as a denial of respect

## II. CLAIMS RELATING TO POWER

- A. *Claims relating to Participation*
  - (I) Claims for individual participation
    1. Claims to be recognized as a person
    2. Claims to be protected in external interactions (nationality)

3. Claims to participate in the internal constitutive process (citizenship)
  - Authoritative
  - Office-holding
  - Voting
  - Controlling
  - Participation in all other value processes
4. Claims not to be denied participation for reasons irrelevant to merit (race, etc.)
- (II) Claims for association in groups (freedom to establish and join groups)
  1. Claims in relation to political parties
  2. Claims in relation to pressure groups
  3. Claims in relation to private associations
  4. Claims in relation to protection for minorities
  5. Claims to change rulers of groups (right of revolution)
  6. Claims to constitute a new entity (self-determination)
  7. Claims to be free from external coercion
- B. *Claims relating to Perspectives*
  1. Claims to be free (after exposure to adequate enlightenment) to acquire, or not to acquire, a demand for power
    - (a) to discover latent capabilities for participation
    - (b) to acquire capabilities
    - (c) to exercise capabilities
  2. Claims for freedom to establish and change identification
  3. Claims for opportunity to achieve realism in expectations
- C. *Claims relating to Arenas*
  - (I) Geographical
    1. Claims for freedom of transnational movement
      - (a) Claims for freedom to enter
        - Nationals
        - Non-nationals
        - Ordinary aliens
        - Refugees
      - (b) Claims for freedom to stay
        - Nationals
        - Non-nationals
        - Ordinary aliens
        - Refugees
      - (c) Claims for freedom to leave
        - Nationals
        - Non-nationals
        - Ordinary aliens
        - Refugees
    2. Claims for freedom of internal movement
      - Nationals
      - Non-nationals
      - Ordinary aliens
      - Refugees
  - (II) Temporal
    - Claims to continuation of rights
  - (III) Authoritative Institutions (freedom to establish internal constitutive process of groups)
    1. Claims to freedom to initiate and constitute institutions specialized to power
    2. Claims to freedom of access to adequate institutions specialized to power

- (IV) Controlling Institutions
  - 1. Claims for freedom to initiate and constitute institutions specialized to values other than power
  - 2. Claims for freedom of access to adequate institutions specialized to values other than power
- (V) Crisis
 

Claims to receive a proportionate degree of public support despite crises (in security, power, respect, enlightenment, well-being, wealth, skill, affection, and rectitude)
- D. *Claims relating to Base Values*
  - (I) Authoritative
 

Claims that the processes of authoritative decision, at all community levels, be available to defend and fulfill all rights
  - (II) Controlling
    - 1. Claims that participation in each of the other value processes is available to defend and fulfill all rights
    - 2. Claims for special assistance to overcome handicaps
- E. *Claims relating to Strategies*
  - 1. Claims relating to the diplomatic instrument
    - (a) Claims to freedom to employ
    - (b) Claims to freedom from coercive employment
  - 2. Claims relating to the ideological instrument
    - (a) Claims to freedom to employ
    - (b) Claims to freedom from coercive employment
  - 3. Claims relating to the economic instrument
    - (a) Claims to freedom to employ
    - (b) Claims to freedom from coercive employment
  - 4. Claims relating to the military instrument
    - (a) Claims to freedom to employ
    - (b) Claims to freedom from coercive employment
- F. *Claims relating to Outcomes*
  - (I) General
    - 1. Claims for a civic domain (freedom from both official and effective power)
    - 2. Claims to freedom from arbitrary seizure and confinement (freedom from arbitrary power of government)
    - 3. Claims to widest possible sharing of power
  - (II) Particular
 

Claims that the community maintain and afford appropriate access to institutions specialized to each of seven functions:

    - (a) Intelligence (access to information relating to decision process)
    - (b) Promotion (freedom to organize and participate in pressure groups and parties)
    - (c) Prescription (voting)
    - (d) Invocation (open access and effectiveness)
    - (e) Application (fair trials, etc.)
    - (f) Termination (referendum, assertion of unconstitutionality)
    - (g) Appraisal (participation in commission of inquiry)

### III. CLAIMS RELATING TO ENLIGHTENMENT

- A. *Claims relating to Outcomes*
  - 1. Claims to an optimum aggregate in the shaping and sharing of enlightenment (gathering, disseminating, enjoying)

2. Claims to basic enlightenment
3. Claims to additional enlightenment on merit
- B. *Claims relating to Participation*
  1. Claims to general participation in receiving and giving enlightenment
  2. Claims to be free of restrictions for reasons irrelevant to merit (race, etc.)
  3. Claims for group participation in opportunity to acquire and disseminate knowledge
- C. *Claims relating to Perspectives*
  1. Claims for freedom to acquire the demand for enlightenment
  2. Claims to be free from conditioning with regard to thought process
    - (a) Claims to be free from state conditioning
    - (b) Claims to be free from private conditioning
  3. Claims to be free from distorted communications
  4. Claims for disclosure of special interests
- D. *Claims relating to Situations*
  - (I) Institutions specialized to enlightenment
    1. Claims for freedom to initiate and constitute institutions of enlightenment
    2. Claims for freedom of access to institutions of enlightenment
  - (II) Institutions not specialized to enlightenment  
Claims for freedom of access to institutions not specialized to enlightenment
  - (III) Crisis  
Claims that enlightenment not be denied disproportionately to crisis
- E. *Claims relating to Base Values*
  - (I) Authoritative  
Claims that the process of authoritative decision is available to defend and fulfill participation in the enlightenment process
  - (II) Controlling
    1. Claims that participation in each of the other value processes is available to the extent necessary to enlightenment (no monopoly in governmental or private sources)
    2. Claims for special assistance
    3. Claims for freedom to acquire and employ appropriate language
- F. *Claims relating to Strategies*
  - (I) Singly
    1. Claims for freedom in small group communication
    2. Claims for freedom in access to and employment of mass communication
    3. Claims for freedom in the assembly of appropriate resources for enlightenment
    4. Claims for freedom to employ the military instrument to preserve enlightenment
  - (II) In Combination  
Claims to freedom from coerced deprivation of enlightenment (censorship)

#### IV. CLAIMS RELATING TO WELL-BEING

- A. *Claims relating to Outcomes*
  1. Claims to an optimum aggregate in the shaping and sharing of well-being
  2. Claims for the right to life
  3. Claims to a basic minimum in safety, health, and comfort
  4. Claims for additional opportunities in accordance with choice—the range of choice: body form (cosmetic surgery); choice of sex; choice of organs (me-



- chanical and human transplantation); choice of children (number, sex and other genetic characteristics)
  - 5. Claims for progress toward optimum somatic and psychological development through life
  - 6. Claims to a merciful euthanasia
- B. *Claims relating to Participation*
  - 1. Claims for general participation in the realization of bodily and mental health and development
  - 2. Claims to be free of restrictions for reasons irrelevant to merit (race, etc.)
  - 3. Claims for group survival and development (no genocide)
- C. *Claims relating to Perspectives*
  - Claims for freedom to acquire the demand for life and its full development
- D. *Claims relating to Situations*
  - (I) Geographical
    - Claims for an environment that is conducive to survival and development
  - (II) Institutions specialized to well-being
    - 1. Claims for freedom to initiate and constitute institutions specialized to well-being
    - 2. Claims for freedom of access to institutions specialized to well-being
  - (III) Institutions not specialized to well-being
    - Claims for freedom of access to institutions not specialized to well-being
  - (IV) Crisis
    - Claims not to be denied well-being disproportionately to crisis
- E. *Claims relating to Base Values*
  - (I) Authoritative
    - Claims that the process of authoritative decision is available to defend and fulfill well-being
  - (II) Controlling
    - 1. Claims that participation in each of the other value processes is available to defend and fulfill well-being
    - 2. Claims for special assistance
    - 3. Claims to be a beneficiary of pertinent science and technology
- F. *Claims relating to Strategies*
  - 1. Claims for the employment of appropriate strategies in relation to health for
    - prevention
    - deterrence
    - restoration
    - rehabilitation
    - reconstruction
    - correction
  - 2. Claims for freedom from coercive strategies
  - 3. Claims to be free to accept or reject medical service (right to die)
  - 4. Claims for freedom to accept or reject transplantation and repair (surgical intervention, drugs, communicative therapy, situation therapy)
  - 5. Claims to employ specified strategies in birth control (family planning, abortion)
  - 6. Claims for the employment of genetic engineering (artificial insemination, incubation outside the body, choice of psychophysical pattern)

## V. CLAIMS RELATING TO WEALTH

- A. *Claims relating to Outcomes*
  - 1. Claims to the maintenance of high level of productivity (rising standard of living)
  - 2. Claims to a basic minimum of benefits from the wealth process (guaranteed income, social security, abolition of poverty)
  - 3. Claims to the enjoyment of benefits on the basis of contribution and merit
- B. *Claims relating to Participation*
  - 1. Claims for general participation in wealth-shaping and sharing (right to work, right to invest and employ resources, right to enjoy)
  - 2. Claims for freedom from restrictions irrelevant to capabilities for contribution (race, etc.)
  - 3. Claims for freedom of association and group shaping and sharing of wealth
- C. *Claims relating to Perspectives*  
Claims for freedom to acquire (or reject) a demand to participate in the wealth process
- D. *Claims relating to Situations*
  - (I) Institutions specialized to wealth
    - 1. Claims for freedom to initiate and constitute institutions specialized to wealth
    - 2. Claims for freedom of access to institutions specialized to wealth
  - (II) Institutions not specialized to wealth  
Claims for freedom of access to institutions not specialized to wealth
  - (III) Crisis  
Claims that wealth not be denied disproportionately to crisis
- E. *Claims relating to Base Values*
  - (I) Authoritative
    - 1. Claims that the process of authoritative decision is available to defend and fulfill wealth demands
    - 2. Claims for a degree of protection in the employment of resources in the wealth process
    - 3. Claims to the continuing accumulation of assets
  - (II) Controlling
    - 1. Claims that participation in each of the other value processes is available to defend and fulfill wealth demands
    - 2. Claims for special assistance
    - 3. Claims to employ resources for productive purposes (claims for freedom from wasteful use of resources)
    - 4. Claims that resources are open to exploitation and development ("economic self-determination," "permanent sovereignty over natural wealth and resources")
- F. *Claims relating to Strategies*
  - 1. Claims for freedom to employ all relevant strategies in the shaping and sharing of wealth
  - 2. Claims to be free from coercive strategies
  - 3. Claims to be free from discriminatory strategies (e.g., discriminatory wages)
  - 4. Claims to be free from capricious and arbitrary management

## VI. CLAIMS RELATING TO SKILL

- A. *Claims relating to Outcomes*
  - 1. Claims to an optimum aggregate in the acquisition and exercise of skills

2. Claims for a basic minimum of skills relevant to effective participation in all value processes
3. Claims for additional acquisition of skill in terms of talent and motivation
- B. *Claims relating to Participation*
  1. Claims for unrestricted opportunity to acquire and exercise socially acceptable skill
  2. Claims for opportunity to have latent talent discovered
  3. Claims not to be denied opportunity to acquire and exercise skill for reasons irrelevant to merit (race, etc.)
  4. Claims that groups are to be accorded skill
- C. *Claims relating to Perspectives*
  - Claims to acquire a demand for, and capability of, skill expression
- D. *Claims relating to Situations*
  - (I) Institutions specialized to skill
    1. Claims for freedom to initiate and constitute institutions specialized to skill
    2. Claims for freedom of access to institutions specialized to skill
  - (II) Institutions not specialized to skill
    - Claims for freedom of access to institutions not specialized to skill
  - (III) Crisis
    - Claims that skill not be denied disproportionately to crisis
- E. *Claims relating to Base Values*
  - (I) Authoritative
    - Claims that the process of authoritative decision is available to defend and fulfill participation in the skill process
  - (II) Controlling
    1. Claims that participation in each of the other value processes is available to the extent necessary to skill
    2. Claims for special assistance
- F. *Claims relating to Strategies*
  1. Claims for exposure to a training of a content appropriate to a culture of science and technology
  2. Claims for exposure to strategies in training relevant to a culture of science and technology (claims for exposure to good teaching)
  3. Claims to be free from coercive strategies (other than those inherent in the process of compulsory education)
  4. Claims for exposure to a socialization process that enables the individual to acquire the motivations and capabilities appropriate to the performance of adult roles in value processes

## VII. CLAIMS RELATING TO AFFECTION

- A. *Claims relating to Outcomes*
  1. Claims to an optimum aggregate in the shaping and sharing of affection (loyalties, positive sentiments)
  2. Claims to a basic minimum of love as a human being (that necessary for individuals to acquire the motivations and capabilities to function effectively in shaping and sharing values)
  3. Claims for additional affection in terms of capability and contribution
- B. *Claims relating to Participation*
  1. Claims to give and receive affection
  2. Claims for freedom from restrictions irrelevant to capabilities (race, etc.)
  3. Claims to give and receive loyalty to groups of one's choice

4. Claims for freedom of association
- C. *Claims relating to Perspectives*  
Claims for freedom to acquire (or reject) a demand to participate in the affection process
- D. *Claims relating to Situations*
  - (I) Institutions specialized to affection
    1. Claims to initiate and constitute intimate and congenial personal relationships
    2. Claims for freedom of access to institutions specialized to affection (adoption, legitimacy, proper spouse)
    3. Claims for recognition of membership in specialized groups
  - (II) Institutions not specialized to affection  
Claims for freedom of access to institutions not specialized to affection
  - (III) Crisis  
Claims that affection not be denied disproportionately to crisis
- E. *Claims relating to Base Values*
  - (I) Authoritative  
Claims that the process of authoritative decision is available to defend and facilitate affection demand
  - (II) Controlling
    1. Claims that participation in each of the other value processes is available to defend and facilitate affection demand
    2. Claims for special assistance (capability of loving and being loved)
- F. *Claims relating to Strategies*
  1. Claims for freedom in the cultivation of love and loyalty
  2. Claims to be free from coercive strategies
  3. Claims to be free from discriminatory strategies

## VIII. CLAIMS RELATING TO RECTITUDE

- A. *Claims relating to Outcomes*
  1. Claims for the maintenance of an order in which individuals demand of themselves and others that they act responsibly
  2. Claims to a minimum opportunity to receive positive evaluation of rectitude as a human being
  3. Claims for movement toward a more perfect participation of all in responsible conduct
- B. *Claims relating to Participation*
  1. Claims for freedom to participate in the formulation and application of standards of responsibility (norms of responsible conduct)
  2. Claims for freedom from restrictions irrelevant to capabilities (race, etc.)
  3. Claims for freedom of association for rectitude purposes
- C. *Claims relating to Perspectives*
  1. Claims for freedom to acquire a demand on the self to act responsibly
  2. Claims for freedom to choose among justifications of responsible conduct (secular and religious justifications, and empirical, transempirical, or metaphysical justifications)
- D. *Claims relating to Situations*
  - (I) Institutions specialized to rectitude
    1. Claims for freedom to initiate and constitute institutions specialized to rectitude
    2. Claims for freedom of access to institutions specialized to rectitude

- (II) Institutions not specialized to rectitude  
Claims for freedom of access to institutions not specialized to rectitude
- (III) Crisis  
Claims that rectitude not be denied disproportionately to crisis
- E. *Claims relating to Base Values*
  - (I) Authoritative  
Claims that the process of authoritative decision is available to defend and facilitate freedom of choice in rectitude
  - (II) Controlling
    1. Claims that participation in each of the other value processes is available to defend and facilitate freedom of choice in rectitude
    2. Claims for special assistance
- F. *Claims relating to Strategies*
  1. Claims for freedom to employ all relevant strategies in the pursuit of rectitude
  2. Claims to be free from coercive strategies
  3. Claims to be free from discriminatory strategies

## APPENDIX II

### POSTULATED POLICIES RELATING TO WORLD CONSTITUTIVE PROCESS

The aspiration should be to achieve a constitutive process which both reflects, and is effective in securing, basic human dignity values. The different features of constitutive process require shaping in such a way as to establish and maintain a wide sharing of power and an appropriate production and distribution of other values. When basic human dignity goals are clarified, many varying institutional practices may be accepted in appropriate implementation of such goals. For purposes of illustration, a number of possible policies are noted with respect to each major feature of constitutive process.

#### I. PARTICIPATION IN DECISION-MAKING

The overriding policy is that of universality: all who are affected by, or who can affect, authoritative decisions should participate in the making of such decisions.

The complementary sub-goals of this basic policy are representativeness and responsibility.

##### A. *Representativeness*

The wide sharing of power requires both pluralism and equality.

All individuals and groups who are affected by decisions should be represented in such decisions, both functionally and territorially.

Participation in decision should be upon the basis of equality in interest, without discriminations irrelevant to merit and contribution and without minorities being authorized to make policies for the whole.

The individual human being should be accepted as an important participant in transnational processes of authoritative decision.

##### B. *Responsibility*

All who can affect authoritative decision should be held accountable for responsible participation in accordance with their capabilities.

Participation may be withheld or limited in terms of capabilities and willingness to bear the burdens of shared decision.

## II. PERSPECTIVES

The constitutive perspectives appropriate to a public order of human dignity are directed toward the clarification and protection of common interests (significantly affecting all) and the rejection of claims of special interests (destructive of common interests).

Common interests include:

- (a) Inclusive interests (more than one participant significantly affected)
  - (i) Minimum order (the prevention of unauthorized violence and coercion)
  - (ii) Optimum order (the maximum possible shaping and sharing of all values)
- (b) Exclusive interests (predominant effects upon one participant)
  - (i) Internal minimum order
  - (ii) Internal optimum order

The perspectives which establish the more detailed content of common interests may be described in terms of demands, identifications, and expectations.

### A. *Demands*

The relevant demands of community members extend to all the basic human dignity values, whatever the preferred forms in categorization.

It should be observed that community members demand different values with differing degrees of intensity, and account should be taken of these differing intensities in demand. A "bill of rights" or *ius cogens* is emerging on the global level comparable to that enjoyed in the more mature national communities.

### B. *Identifications*

The identifications of established decision-makers, as of community members, extend in many varying degrees to the larger community of mankind and its lesser component communities. For the better clarification and integration of common interest, an appropriate balance should be sought for decision-makers in terms of culture, class, group membership, and personality.

### C. *Expectations*

Established decision-makers, again like community members, differ greatly in their expectations, or matter-of-fact assumptions, about the conditions under which demanded values can be secured. The realistic orientation of all in context requires unceasing effort to improve structures and procedures for inquiry and communication.

## III. ARENAS

Relevant policies relate to both establishment and access.

### A. *Establishment*

The creation and maintenance of authoritative structures appropriate to optimum decision may be sought in terms of certain features.

1. Institutionalization  
Balanced: adequate but not over-bureaucratized; organized and unorganized; specialized to particular functions and non-specialized.
2. Geographic range  
Balanced between centralized and de-centralized; integrated in a way to take into account the range and intensity of impacts within different areas.

3. Temporal  
Continuous, rather than sporadic; permitting an appropriate timeliness in decision.
4. Responsive to crises  
Alert and appropriately anticipatory.

#### B. Access

1. Open  
Available to all with interest.
2. Compulsory  
With process running to all who affect public order.

### IV. BASES OF POWER

The promotion of a public order of human dignity requires a pluralistic distribution of both authority and effective control.

#### A. Authority

1. The rule of law should be extended to all interactions. There should be no honoring of "political questions". The general community should not recognize a competence in any particular community to protect special interests, destructive of common interest.
2. The general community should determine the allocation between inclusive competence ("international concern") and exclusive competence ("domestic jurisdiction"). All aspects of human rights should be recognized as of international concern.
3. Inclusive decision-makers should be accorded the competence necessary to protect inclusive interests.
4. Exclusive decision-makers should be accorded the competence necessary to protect exclusive interests.
5. Conflicts between inclusive and exclusive competence, and different exercises of exclusive competence, should be resolved by a disciplined, systematic examination of the features of the context that affect interest.

#### B. Control

The controlling bases of power should be allocated in a way to make authority effective. A presumption should be indulged in favor of a pluralistic distribution of all values, with an appropriate balancing between different territorial communities and between functional and territorial groups.

### V. STRATEGIES

Policies of human dignity will seek an appropriate integration of all strategies (diplomatic, ideological, economic, military), with a strong emphasis upon persuasion rather than coercion. Coercion will be authorized only as necessary and proportionate for securing public order. Procedures will be preferred which respect human dignity in detail—with no unnecessary violence, invasions of privacy, or other value deprivations. Similarly, priority will be given to procedures which are open, not covert or secret, and which have a maximum effect upon enlightenment, with an empathetic ceremonialization of the community values at stake.

Some of the policies relevant to the sequence of activities or procedures common to most types of decisions may be indicated in tabular form:

1. Initiation of decision process
  - Prompt
  - Non-provocative
  - Fair (appropriate notice)

2. Exploration of potential facts and policies
  - Dependable
  - Comprehensive
  - Selective (relevant)
  - Creative
  - Available
3. Characterization of facts and policies
  - Deliberate, reasoned assessment, employing contextual analysis in characterization of alternative choices.
4. Communication
  - Effective to create shared subjectivities
  - Persuasive
5. Implementation
  - Effective
  - Ameliorative

## VI. OUTCOMES

The culminating outcomes of constitutive process include both certain aggregate consequences for public order and a continuous flow of particular types of decisions affecting public order.

### A. *Aggregate Consequences*

The design of a public order of human dignity should be to establish a constitutive process which will culminate in outcomes having the following characteristics:

1. Rationality
  - The particular decisions emerging from constitutive process should in fact integrate and secure common interests in the goal values of human dignity. Appropriate account should be taken of both short-term and long-term goals and all important community identifications.
2. Efficiency
  - The process should be maintained as economically as possible in its expenditure of participants' resources in relation to goals.
3. Inclusivity
  - The decision outcomes should be made to embrace all participants and interactions affecting public order and should be applied equally, without discriminations irrelevant to merit and contribution.
4. Comprehensiveness and integration
  - The process should employ all the necessary types of decisions, appropriately integrated, in the degree necessary to secure the demanded public order.

### B. *Particular Functions (Types of Decisions)*

The more important policies in relation to each type of decision may be conveniently specified in tabular form:

1. Intelligence (general exploration of potential policies)
  - Dependable
  - Comprehensive
  - Selective
  - Creative
  - Available
2. Promotion (taking initiatives and mobilizing opinion toward particular policies)
  - Rational



- Integrative
- Comprehensive
- Effective
- 3. Prescription (establishing certain policies as authoritative and controlling for community)
  - Effective (establishing a certain stability in expectations about authority and control)
  - Rational (gives effect to common rather than special interests; appropriately balanced in the protection of inclusive and exclusive interests)
  - Inclusive (extends to all interactions affecting common interests)
  - Prospective
- 4. Invocation (preliminary characterization of particular events in terms of prescriptions)
  - Timely (prompt, available, open)
  - Dependable (in characterizing facts)
  - Rational (responsive to common interests)
  - Non-provocative
  - Effective (in stimulating application)
- 5. Application (final characterization of particular events in terms of prescriptions)
  - Rational (in conformity with prescriptions in common interest)
  - Uniform (contextual; unbiased; independent of special interests)
  - Effective (put into controlling practice)
  - Constructive (contributes to prescription; mobilizes consensus toward policy and increases effectiveness)
- 6. Termination (putting an end to prescriptions and arrangements effected under them)
  - Timely (prompt; to inject the expectation that change can be carried on in ways compatible with human dignity)
  - Comprehensive and dependable (in exploration of facts and policies)
  - Balanced (in characterization of facts and policies in relation to conservation and change)
  - Ameliorative (minimizing destructive impact of change)
- 7. Appraisal (intelligence focused on decision processes)
  - Dependable (realistic)
  - Continuing
  - Independent (unbiased)
  - Contextual

## APPENDIX III

## VALUES PROTECTED BY DIFFERENT HUMAN RIGHTS CONVENTIONS

<div>Values</div> <div>Specific Provisions</div> <div>Human Rights Prescriptions</div>	Respect	Power	Enlightenment	Well-Being	Wealth	Skill	Affection	Rectitude	All 8 Values
Universal Declaration of Human Rights	1,2,4,6,7,12	7,8,9,10,11 13,14,15,21	19,22,26,27	3,5,22,24 25	4,17,22,23, 27(1)	27	16	18	20,22,27 28
International Covenant on Civil and Political Rights	2(1),3,4(1), 7,8,16,17, 24(1),25,26, 27	1(1),(3),2(2), (3),9,11,12 13,14,15, 24(2),(3),25, 27	19,20	6,7,10	1(2),8		23	18	21,22
International Covenant on Economic, Social and Cultural Rights	2(2),(3),3	1(2),(3)	13,14,15	7,10,11,12	6,7,8,9,10	6(2), 13(2)(b)	10(1)		
European Convention on Human Rights	3,4,8,14	5,6,7,13,16 1st prot.,3, 4th prot.,1, 4th prot.,2,3,4	10,1st prot.,2	2,3,4,	4, 1st prot.,1		12	9	11
American Convention on Human Rights	1,2,3,5,6, 11,14,17(2), 18,19,24, 27(1),31	3,7,8,9,10,20, 22,23,24,25	13,14	4,5,6	6,10,21		17	12	15,16

## APPENDIX IV

## PROVISIONS FOR ACCOMMODATIONS AND DEROGATIONS IN DIFFERENT HUMAN RIGHTS CONVENTIONS

<div><div>Nature of Complementarity</div><div>Specific Provisions</div><div>Human Rights Prescriptions</div></div>	Accommodations									Derogations
	General	Respect	Power	Enlightenment	Well-Being	Wealth	Skill	Affection	Rectitude	
Universal Declaration of Human Rights	29,30									
International Covenant on Civil and Political Rights	5,21, 22(2)		12(3),13 14(1)	19(3)					18(3)	4,5(2)
International Covenant on Economic, Social, and Cultural Rights	4,5									5(2)
European Convention on Human Rights	11(2), 17,18	8(2)	5(1),6(1), 4th Prot., 2(3),(4)	10(2)		1st prot.,1			9(2)	15
American Convention on Human Rights	15, 16(2),(3), 32		22(3),(6)	13(2),(4)		21(2)			12(3)	27

